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Nos. 751 and 752

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 751

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, et al.,
Appellants,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

No. 752

INTERSTATE COMMERCE COMMISSION,
Appellant,

vs.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

MOTION TO AFFIRM

ELDON MARTIN
ROBERT J. COONEY
FRANK S. FARRELL
ROBERT G. GEHRZ
WILLIAM P. HIGGINS
CURTIS H. BERG
JOHN H. BISHOP
LOUIS E. TORINUS, JR.
1120 Great Northern
Building
St. Paul, Minnesota 55101
PAUL M. SAND
The Capitol
Bismarck, North Dakota
Counsel for Appellees

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INDEX

	PAGE
Statement	2
The Question Presented	3
The Administrative Proceeding	5
The Commission's Report	11
Decision of the District Court	13
Argument	14
Conclusion	25
Appendix	1a

CITATIONS

Cases:

Board of Trade of Kansas City v. United States, 314 U.S. 534 ..... 2, 3, 6, 7, 14, 15, 17, 1a, 2a

Branding Iron Club v. Riggs, 207 F. (2d) 720 (C.A. 10th 1953) 20

Burlington Truck Lines v. United States, 371 U.S. 156 18

Chicago, Burlington & Quincy R.R. Co. et al. v. United States et al., 242 F. Supp. 414 ..... 2, 3, 7, 13, 14

Civil Aeronautics Board v. State Airlines, 338 U.S. 572 ..... 19, 20

PAGE

Dallas, City of, v. Civil Aeronautics Board, 221 F. (2d) 501 (D.C. Cir. 1954) Cert. Denied, 348 U.S. 914 20

Florida Citrus Comm. v. United States, 144 F. Supp. 517 (N.D. Fla. 1956) 21

Gilbertville Trucking Co. v. United States, 371 U.S. 115 18

Grain and Grain Products, 164 I.C.C. 619 .....2, 6, 15, 1a

Grain and Grain Products, 205 I.C.C. 301 .....2, 3, 6, 13

Grain and Grain Products, 215 I.C.C. 83 .....2, 3, 6, 13

Grain and Grain Products, 298 I.C.C. 261 .....10, 17, 23, 25

Grain Case Modifications (Grain and Grain Products), 231 I.C.C. 793 15

Grain To, From and Within Southern Territory, 259 I.C.C. 629 16

Greene v. United States, 376 U.S. 149..... 22

Hill v. Federal Power Comm'n, 335 F. (2d) 355 (5th Cir. 1964) 24

Increased Freight Rates, 1958, 302 I.C.C. 665 .....23, 24

PAGE

Interstate Commerce Commission v. Louisville & N. R. Co., 227 U.S. 88 18

Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 18

Morgan v. United States, 304 U.S. 1 ..... 22, 24

Nebraska-Colorado Grain Producers Assn. v C. B. & Q. R. Co., 243 I.C.C. 309 17

New York Central & H. R.R. Co. v. Interstate Commerce Commission, 168 F. 131 (C.C. S.D. N.Y. 1909) 20

Omaha Grain Exchange v. C. B. & Q. R.R. Co. et al., 322 I.C.C. 743 ..... 2, 3, 4, 7, 11, 12, 13, 16, 17

Pacific Inland Tariff Bureau v. United States, 129 F. Supp. 472 (D.C. Ore. 1955); 134 F. Supp. 210 22

Royal Feed & Milling Co. v. Arkansas & L.M. Ry. Co., 281 I.C.C. 145 16

Securities & Exchange Comm'n v. Chenery Corp., 318 U.S. 80 16

Siegel Co., Jacob, v. Federal Trade Commission (See Jacob Siegel Co. v. Federal Trade Commission)

Southeastern Association of Railroad and Utilities Comm'rs v. A.T. & S.F. Ry. Co., 321 I.C.C. 519 (1964) 6, 24

PAGE

Tagg Bros. v. United States, 280 U.S. 420 20

United States v. 47 Bottles, More or Less, Etc., 320 F. (2d) 564 (3rd Cir. 1963); Cert. Den. 375 U.S. 953 21

United States v. Pierce Auto Lines, 327 U.S. 515 20

Statutes:

Administrative Procedure Act:

Section 2(c), 5 U.S.C. 1001(c) 4, 23

Section 4, 5 U.S.C. 1003 ..... 3, 5, 14, 23, 24

Interstate Commerce Act:

Section 15(7), 49 U.S.C. 15(7) 22

Section 16(6), 49 U.S.C. 16(6) 3, 5, 11, 14, 16, 23

28 U.S.C. 2284 2

28 U.S.C. 2325 2

Federal Rules of Civil Procedure:

Rule 15(b) 20

Rule 54(c) 21

Interstate Commerce Commission's Rules of Practice:

Rule 72, 49 U.S.C.A. 298 8

Interstate Commerce Commission's "Approved Forms":

49 U.S.C.A. 340 19–20

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the six appellee railroad companies[1] and appel-

[1] Chicago, Burlington & Quincy Railroad Company, Great Northern Railway Company, Northern Pacific Railway Company, Soo Line Railroad Company, Union Pacific Railroad Company, and Norfolk and Western Railway Company.

lees Public Service Commission of North Dakota, North Dakota Mill and Elevator Association, and Grand Forks Chamber of Commerce of Grand Forks, North Dakota, move that the judgment of the District Court be affirmed on the ground that it is manifest that the question on which the decision of these appeals depends is so unsubstantial as not to need further argument.[2]

STATEMENT

These are direct appeals from a final judgment entered May 24, 1965, by a unanimous three-judge district court convened pursuant to Section 28 U.S.C. 2284 and 2325, setting aside an order of the Interstate Commerce Commission entered June 5, 1964, which modifies outstanding orders entered October 22, 1934, and March 4, 1936, in the Commission's comprehensive general grain rate investigation, Docket 17000 Part VII, *Grain and Grain Products Within the Western District and for Export*,[3] so as to eliminate the requirement throughout the entire Western district for the mandatory rate-break rule on shipments of grain and grain products moving via primary markets.[4]

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[2] The district court's memorandum opinion is reproduced as an appendix to the jurisdictional statements in each appeal (I.C.C. J.S. 1a; C&NW J.S. App. A) and is reported at 242 F. Supp. 414.

[3] Herein called *Grain and Grain Products*.

[4] For an explanation of the terminology used in describing the grain rate structure see *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 535-543, *Grain and Grain Products*, 164 I.C.C. 619, 633-635, and the Commission's report (C&NW J.S. App. C), 322 I.C.C. 743 at 747.

For convenience the principal definitions are reproduced as an appendix to this Motion.

The district court held that the June 5, 1964, order making this general modification was void because it was entered without the notice required by Section 16(6) of the Interstate Commerce Act, 49 U.S.C. Section 16(6), and Section 4 of the Administrative Procedure Act, 5 U.S.C. Section 1003, but did not pass on the question whether these long-standing requirements might be changed in an appropriate proceeding (242 F. Supp. at 417).

The Question Presented

To show clearly the question presented by these appeals it is necessary to outline briefly the proceedings before the Commission and the court below.

After a general grain rate investigation extending over almost a decade, in Docket 17000 Part VII, *Grain and Grain Products*, the Commission entered orders on October 22, 1934, and March 4, 1936, requiring throughout the entire Western district[5] the observance of rate-break combinations and of proportional rates therein prescribed on shipments of grain and grain products moving via primary markets, whether stopped in transit or not. (205 I.C.C. 301; 215 I.C.C. 83 at 87; 322 I.C.C. at 750)

For more than a quarter century the absolute rate-break system has been the basic structure on which domestic shipments of wheat and its products, and to a large extent other grains and grain products, move by rail from west to east through the nation's great Midwestern grain markets.

In 1959 and 1960 five complaints were filed with the Commission on behalf of milling companies and other business

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[5] The entire area "on and west of the Mississippi River, west of Lakes Superior and Michigan, and west of and including Illinois." *Board of Trade of Kansas City v. United States*, 314 U.S. 534, 536.

interests at six of the eight principal primary markets, which challenged the carriers' maintenance of the rule on certain shipments moving over specified routes in limited areas of the West. The Commission described the complaints as covering "a small but important segment of the traffic" (322 I.C.C. at 755) but not "the great majority of the traffic which would continue to move under the rate break combinations" (*id.* at 756).

The five cases were consolidated for hearing and disposition. After hearings, briefs and oral argument, and submission of the cases in October, 1962, the Commission sustained the rate-break rule as lawful on the limited traffic in issue and dismissed the five complaints by a report and order dated June 5, 1964, but at the same time it entered an order in Docket 17000 Part VII, *Grain and Grain Products*, which both reopened and simultaneously modified the rate-break rule as it applied on traffic throughout the West moving via primary markets, making maintenance of the rule permissive rather than mandatory.[6]

This general modification was made even though (a) the five complaints were separately docketed under specific numbers; (b) Docket 17000 Part VII had not theretofore been reopened or included in the consolidated proceedings embracing the five complaints; (c) the Commission had not given prior notice that it contemplated or was to consider any reopening of Docket 17000 Part VII or modification of the rate-break rule as it applied generally; and (d) during the hearings in the five complaint cases an effort to bring into issue the question whether Docket 17000 Part VII should be reopened

[6] Under the Administrative Procedure Act "rulemaking" includes the "formulation, amendment, or repeal of a rule." 5 U.S.C. Sec. 1001 (c).

and the general outstanding orders modified had been expressly denied.[7]

Appellee railroads, joined by the North Dakota appellees, asked the district court to set aside the modifying order on the principal ground that the Commission had given no notice that such action would be considered, as required by Section 16(6) of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act.

The sole question decided by the court below was whether or not notice was given. With the entire record of the Commission before it, the three-judge court found unanimously that there was no such notice and therefore concluded that the order was void.

Appellants do not question that a notice relating to the issue of a general modification of these comprehensive orders, as distinguished from an order affecting the application of the rule on the limited traffic covered by the five complaints, was required. The sole question to be decided on these appeals is whether the district court correctly determined that such notice had not been given.

The Administrative Proceeding

The interest of the North Dakota appellees, as well as that of the railroad appellees in continuance of the mandatory rate-break rule is evident from the Commission's often-quoted statement that disruption of the rate-break combinations would:

> "* * * disorganize the general rate structure, make uncertain in advance the outbound basis of charge, give undue preference to the users of transit balances over

[7] Commission order of April 19, 1961, third par. and final par.

> the users of proportional rates, depress the price of grain at the rate-break markets and, by direct reflection, at the country points, and reduce the revenues of the carriers." (205 I.C.C. at 334).[8]

An exception to the general rate-break rule stems from the Commission's expressed intention "not * * * to prevent carrier competition that does not disrupt the basis of making rates by combinations on the primary markets" (164 I.C.C. 619, 645). The exception permits the establishment of a competitive overhead rate over a route passing through a primary market to meet another single-factor rate between the same points applicable over another route by-passing such market. Transit is permitted on such an overhead rate but only at interior points on the route and not at the primary market, where the general rule for rate-break combinations applies. A practical illustration of the exception is set out in *Board of Trade*, 314 U.S. at 543 as follows:

> "At all interior points lying on routes from Kansas City to Chicago, transit privileges were available at the 16 cents rate, while shipments stopping for transit at primary markets along such routes, e.g., Omaha, Atchison, Leavenworth, and St. Joseph, could move only at the rate-break combination of the 6½ cents inbound rate and the 16 cents outbound rate."

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[8] Contrary to appellant Commission's present characterization of these proportional rates as "minimum rates" (J.S. 2, 4), the Commission's orders of 1934 and 1936 prescribed them as maximum rates. The effect was to reduce most of the proportional rates then effective (*Grain and Grain Products*, 205 I.C.C. 301, 472, 486; 215 I.C.C. 83, 96-98).

Under the existing rate-break system "* * * reduced rail rates have been established both in the West and South to meet motor carrier competition." *Southeastern Association of Railroad and Utilities Comm'rs v. A.T. & S.F. Ry. Co.* (1964), 321 I.C.C. 519, 545-546.

In *Board of Trade* this Court sustained such a differentiation between primary markets and interior points.

It was this exception, not the general application of the rule, which brought about the five individually docketed complaint cases which were the subject of the Commission's report at 322 I.C.C. 743 (C&NW J.S. Appendix C). Thus the Commission, in describing the allegations of the five complaints, stated (322 I.C.C. at 755-756):

> "It is only in instances where a one-factor through rate from origin to transit destination, lower than the rate-break combination applicable on shipments transited at a particular market, applies through that primary market on shipments transited at interior points, that the rate-break combinations are alleged to be unlawful."

And further:

> "The complainants do not seek new rates or routes, but seek only transit on the lower rates through the primary markets which is now available to the interior points. According to the complainants, such privileges would in no way affect the great majority of the traffic which would continue to move under the rate-break combinations." (322 I.C.C. 743, 756)

The portion of the Commission's report quoted by the district court (242 F. Supp. 414, 415) likewise demonstrates the definite limitation on the issues involved:

> "Moreover, the complainants concede that on the great majority of the considered traffic, which flows from west to east, the normal drawing areas for each of the primary markets are territories from which there are no through rates by way of these markets less than the rate-break combinations, and therefore present no problem to the primary market. *However, it is contended that on a small but important segment of the traffic* the rates applicable

on shipments transited at the primary markets subject those markets and the transit operators located thereat to an unreasonable handicap in competing with interior markets and transit operators." (Emphasis the court's.)

While appellants now suggest that these complaints raised somewhat broader issues (Commission J.S. 6; C&NW J.S. 3, 6-8), such a conclusion is not supported by the pleadings themselves, which specify the transportation involved,[9] and is contradicted by assertions of complainants throughout the proceedings[10] and by the treatment of the issues by the examiner and by the Commission.[11]

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[9] Each of the complaints attacked the rate-break rule and the charges resulting from its application only as to shipments transported over limited routes. This is true not only of the Atkinson Milling Company complaint (Commission J.S. 6, fn: 6) but also of those complaints attacking as an unreasonable regulation the tariff rule quoted in C&NW's Jurisdictional Statement at Appendix D-3. (See complaints in Docket 33426 (Atkinson), pars. VII, VIII, IX, XII, XIV, XVI, XVII; Docket 33397, pars. V, VI, VII, VIII; Docket 33469, pars. V, VI, VII, VIII, IX; Docket 33171, pars. IV, VI, VIII, IX, X, XI; and Docket 33338, pars. V, VI, VII, VIII, IX.

The complaints contain a further limitation also: They do not challenge the application of the rate-break rule on any shipments stopped for transit at the primary markets of Duluth, Minn., or Sioux City, Iowa (see list of primary markets included in the complaints at 322 I.C.C. 744 and at C&NW J.S. Appendix D-2). (Sioux City was permitted to intervene on petition filed at the June 13, 1960, hearing on condition that the issues be "not unduly broadened" under the Commission's General Rules of Practice, Rule 72, governing interventions, 49 U.S.C.A. 298).

[10] For example:

> "Atkinson would like to respectfully draw the Commission's attention to the fact that its complaint involves only one isolated situation, that is wheat from Omaha, Nebraska, when from beyond, shipped to Minneapolis, Minnesota, for milling into flour, and the flour reshipped to Eastern Territory." (R. 1621)

(See also R. pp. 25 and 1588; Pillsbury's Reply to Exceptions, pp. 3, 5.)

[11] As noted by the district court. See *infra* pp. 13-14.

North Western asserts that during the course of the administrative proceeding "it actively advocated vacation of the [rate-break] rule throughout the West" (C&NW J.S. 7). On these appeals the Commission supports that assertion (J.S. 13-14). However, such advocacy by North Western during the hearings and on brief to the examiner was for vacation of the rule "*through the medium of a petition* for modification and reopening of the 17000 Part VII order" (emphasis supplied, R. 24-25; Exh. 119, p. 4) or, stating the same proposal in another way, "* * * in a manner similar to the action of the Commission concerning the coarse grain adjustment,[12] an action of the Commission which took place only after the filing of a petition in Docket 17000 Part VII for vacation of the rule as to coarse grains and the holding of a hearing on

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[12] Exh. 119, p. 10, quoted in Commission J.S. 13-14; C&NW Brief to the Examiner, 16.

When Exhibit 119 was offered, a practitioner representing complainant Atkinson sought enlightenment on C&NW's position:

> "Q. (By Mr. Springrose) I would like to ask in connection with Page 4 of your written statement, you refer to the suggestion of the North Western Railroad that the proper procedural approach to this problem would be through the medium of a petition for a modification, and so forth, of Docket 17000 Part 7. A number of cases are here consolidated and in the Atkinson Flour Mills case we have only one situation with which we are concerned, and I was wondering if you felt that it would be necessary to go through all of the procedural motions that would be necessary to reopen 17000 in order to dispose of an isolated problem such as we have submitted in our complaint. Would you have any comment on that?
>
> "A. Well, the statement was made at the June 13 hearing and was overruled by the examiner at that time. My comment would be that the essence of the complaints lies in one thing—"

Further answer was objected to by North Western's counsel on the ground that the question "calls for a legal conclusion," and the objection was sustained. (R. 1245)

that territory-wide issue. (*Grain and Grain Products*, 298 I.C.C. 261, 262) North Western's very suggestion that such a petition should be filed negated the notion that the issues had already been broadened. North Western's suggestion was objected to by the complainant markets,[13] and the only such petition which was filed during the period of the hearings, by the Department of Agriculture, was denied by the Commission "for the reason that sufficient grounds have not been presented to warrant granting" the petition.[14]

After the hearing record was closed and on exceptions to the examiner's report, North Western urged for the first time that the Commission in disposing of the cases then under consideration should eliminate the mandatory feature of the rate-break rule throughout the West. Appellee railroads and one of the principal complainants called attention to the fact that this suggestion was outside the scope of the issues heard.[15] The Commission then noticed the five complaints for oral argument without including any reference to Docket 17000 Part VII,[16] and at the argument North Western's statement of the issues was disputed by the appellee carriers but not ruled upon (R. 1666).

In defending the lawfulness of the rate-break rule as it applied to the traffic in issue in these five cases, appellee railroads, defendants before the Commission, pointed to the generality of the rule throughout the West and to circumstances

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[13] Counsel for complainants: "It is pretty late to raise issues like that." (R. 25)

[14] Footnote 7 *supra*.

[15] Reply of Defts. to Exceptions of C&NW, 2; Reply of Pillsbury, 3.

[16] Notice of August 3, 1962, assigning oral argument October 5, 1962.

showing it to be a reasonable and lawful regulation, but, as above indicated, disputed North Western's contention, advanced on exceptions and in oral argument, that the vacation of the mandatory rate-break rule throughout the West was within the issues for determination.[17]

The Commission's Report

Thirty printed pages of the 33-page report are devoted to an analysis of the five complaint cases which were dismissed (322 I.C.C. from 743 to 772).

The final three pages set out the reasons which persuaded the Commission to reopen Docket 17000 Part VII and to modify, simultaneously and with no advance notice, the outstanding orders requiring the maintenance of the absolute rate-break rule throughout the West. The Commission first characterized this contemplated reopening and modification of the Docket 17000 orders as "an alternative" and "a form of relief less than that sought in the complaints." In the subsequent discussion it is clear, however, that such action was being taken through the reopening of another docket, "pursuant to our authority under section 16(6) of the Act." (322 I.C.C. 743, 775)

Despite the fact that earlier in its report the Commission had "stressed that the level of the considered rates is not in issue" (322 I.C.C. at 755), and that it had found the absolute rate-break rule "not shown to be unreasonable" and the

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[17] Reply of Defendants to Exceptions of C&NW, 2. See also R. 1666:

> "The carriers that I represent flatly disagree with the Chicago and North Western Railroad. * * * We * * * think it is clear that this case, the issues in this case do not encompass any abolition of the rate-break structure as a whole."

charges resulting therefrom "not shown to be unjust, unreasonable or otherwise unlawful," and had ordered dismissal of the five complaints (322 I.C.C. at 772), it undertook to review what it considered to be the effect of the mandatory rate-break rule on the "level of rates" maintained, not only in limited areas or over specified routes, but in respect to the great majority of traffic moving under the widespread rule and not embraced in the complaints.

In making this review it commented on rate reductions "in other areas" as compared with "a rather static situation within the western district." Though cost of service was not an issue (since the five cases did not involve rate levels), the Commission stated that the rate-break rule requires rates "without significant regard to costs, a factor we recognize of extreme significance today" (322 I.C.C. at 773).

Notwithstanding that these complaints raised no issue of intermodal competition, it said that the rate-break rule precluded "bare-bone" pricing "in instances where unregulated competition would compel such action." (*id.*, 774)

It concluded that in order to give the railroads "greater opportunity for competitive initiative" in pricing, the mandatory rule should be vacated. And though the complaints had sought merely additional transit privileges under the present rates on limited movements, the Commission gave as an example of what might be done under its territory-wide modification in Docket 17000 Part VII "*restrictive* transit and routing provisions" providing "*a lesser service for a lower rate.*" (Emphasis supplied; 322 I.C.C. at 775.)

Petitions for reconsideration were filed by appellees and others August 3, 1964, coupled with a request that pending reconsideration the broad modifying order be vacated; replies to the petitions were filed August 17 to 24, and the petitions

were denied by order dated September 1, 1964. Vice Chairman Webb, whose dissent from the Commission's action is referred to by the district court,[18] voted to grant reconsideration, and Chairman Goff voted for a further hearing solely with respect to the vacation of the absolute rate-break rule.[19]

Meanwhile, after receiving the petitions for reconsideration and before they were passed upon, the Commission issued a notice that a "correction" would be made in footnote 1 of the title page of its report at 322 I.C.C. 743 to show that, in addition to the five complaint cases, Docket No. 17000 Part VII was indeed one of the proceedings in which the report was issued.

Decision of the District Court

In its memorandum opinion the district court states "that at no time did the Commission give any notice that it contemplated reopening Docket 17000 Part VII, nor * * * of the proposed modification of the orders of October 22, 1934 and March 4, 1936 to make observance of the 'rate-break' rule voluntary or permissive instead of mandatory throughout the entire Western district." (242 F. Supp. at 416)

The court noted that "the Commission's Report recognized that complainants' contentions related to a 'small but important segment of the traffic'," but that the Commission abolished the "absolute 'rate-break' rule not only as to the limited area covered by the five complaints but also throughout the entire Western district." (242 F. Supp. at 416)

The court also observed that the examiner's recommended report contained a statement of the limited issues raised by

[18] *Infra*, p. 14.

[19] Minute action of September 1, 1964.

complainants, "to which limitation of the issues no exception was taken"; and further, that "at one point during the proceedings before the Commission on the five complaints, the Secretary of Agriculture of the United States, an intervenor, requested that Docket 17000, Part VII, be included in the proceedings but the request was denied by the Commission" (*id.*, 416-417). The district court concluded by saying: "We agree with Vice Chairman Webb who stated in his dissent that 'No segment of the grain trade and no carrier had any reason to suppose that any such drastic action was within the scope of this proceeding'." (242 F. Supp. at 417)

Because both Section 16(6) of the Interstate Commerce Act and Section 4 of the Administrative Procedure Act require notice, the Commission's order was set aside. The district court expressly said that it was "not considering or passing on the question of whether" the outstanding orders in Docket 17000 Part VII "should be modified or changed in an appropriate proceeding by the Interstate Commerce Commission" (*id.*).

ARGUMENT

I

The Commission urges that the judgment of the court below would "narrow the choice of relief which the Commission may consider" in lengthy and intricate cases and that in this respect it is contrary to the specific holding of *Board of Trade of Kansas City v. United States*, 314 U.S. 534 at 547, in a situation claimed to be similar. There, the Commission now asserts (J.S. 10-11), this Court stated that even though the complaints to the Commission there involved sought "man-

datory relief" the Commission "had several choices before it" and "might have abolished the privilege of free transit entirely," a solution said to be exactly the opposite of that requested.[20]

The Commission's argument, however, incorrectly attributes the statements it quotes from *Board of Trade* as applying to the complaints there referred to. In discussing the choice of remedies available to the Commission following its "laborious investigation" into the grain rate structure (314 U. S. at 547), this Court was speaking not of choices available to the Commission in complaint proceedings but of the choices available under the Commission's general grain rate investigation at the time the territory-wide rate-break rule was prescribed, for immediately following that discussion the Court cites the Commission's initial report in that comprehensive proceeding, 164 I.C.C. 619, 698. The Court's reference following that citation, to giving the rate-break a "reasonable trial," likewise appears in the initial report in the general investigation, 164 I.C.C. 619, 698.

In contrast, the modifications sought in the complaint cases referred to in *Board of Trade*, were characterized in the Court's decision as embracing "only a minor phase" of the entire grain rate structure (314 U.S. at 548). And this characterization was made despite the fact that the complaints there, unlike the five complaints here, had been argued to the

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[20] The "mandatory relief" sought in the complaints there considered included an alternative request for either transit at primary markets on overhead rates through the markets *or* cancellation of the transit privilege on such rates at interior points. Also, Docket 17000 Part VII had then been specifically reopened in certain of its aspects. (231 I.C.C. at 794)

Commission following a reopening of Docket 17000 Part VII in certain of its aspects.[21]

Moreover, consistent with its practice the Commission in the instant case did not predicate its order of reopening and modification in Docket 17000 Part VII as responsive to the issues litigated in the five complaint cases. If the Commission had so intended, it would not have been necessary to refer, at it did (322 I.C.C. at 775), to Section 16(6) of the Act in purported justification of the action it was taking. As said in *Securities & Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87:

> "The grounds upon which the administrative order must be judged are those upon which the record discloses that its action was based."[22]

---

[21] See footnote 20, *supra*.

[22] Appellant railroads (C&NW J.S. 6 and at footnote 9) contend that for the Commission to give notice that a modification of the Docket 17000 Part VII orders in their general application was an issue for consideration "would have been contrary * * * to Commission practice," said to be "followed in over twenty years of cases * * * where modification of this same rule was handled, as here, under specific complaint dockets."

Appellants are in error. Where the application of the 17000 Part VII orders is attacked in a complaint covering specified traffic and there is, as in most cases, no broadening of the issues to cover traffic not embraced in the complaint, it has been the practice not to give notice that the modification of the 17000 Part VII orders in their application to the complained-of traffic is in issue. That is because, as stated in *Grain To, From and Within Southern Territory*, 259 I.C.C. 629, 693, in commenting on the Docket 17000 Part VII prescribed rate-break rule, the Commission said:

> "The findings were not intended to bar such exceptions to the rule as might be found necessary to its practical application and the avoidance of injustice in specific situations."

See, for example, *Royal Feed & Milling Co. v. Arkansas & L.M. Ry. Co.*, 281 I.C.C. 145, 152, where the complaints sought an exception from the rate-break rule, it was granted, no notice that the terri-

The Commission's collateral contention (J.S. 11) that the order which the district court here set aside granted "lesser relief" than that sought by the five complaints is answered both by the circumstance, as stated above, that the Commission did not rest its order on those complaints, and the important fact that the five complaints were limited to a small minority of the traffic, whereas the modification of the Docket 17000 Part VII orders attempted here would have affected also "the great majority" of the traffic moving through primary markets (322 I.C.C. at 755-6).

The district court's judgment is entirely consistent both with *Board of Trade*, which was decided in 1942 before enactment of the Administrative Procedure Act and with the Act itself.

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tory-wide 17000 Part VII orders were in issue appears from a description of the complaints in the report, and no general modification was made.

But where a territory-wide modification of the Docket 17000 Part VII general orders is contemplated which is not within the scope of a pending complaint, the practice is to give notice that Docket 17000 Part VII is being reopened for further consideration, and in what respect, and to afford interested shippers and carriers an opportunity to present data and argument, just as was done before the modification with respect to coarse grain was ordered effective. *Grain and Grain Products*, 298 I.C.C. 261, 262.

Compare *Nebraska-Colorado Grain Producers Assn. v. C., B & Q. R. Co.*, 243 I.C.C. 309, involving a complaint attacking grain rates from specified origins:

> "The Nebraska State Railway Commission contends that there is no necessity for the present Colorado-Nebraska origin group and asks that it therefore be broken up as it says was done with rates on classes and commodities generally. That cannot be done on this record, however, as the group rate is not in issue here. The group boundaries and rate were prescribed as a unit in the *Grain case*, and cancelation of the group would be proper only on a record broad enough to include all points in the group." (243 I.C.C. 330-331)

II

The Commission next asserts (J.S. 10-11) that the district court "reversed the Commission for doing precisely what the Supreme Court recently ordered the Commission to do in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115; and in *Burlington Truck Lines v. United States*, 371 U.S. 156." These cases hold that the Commission must exercise judgment in "choosing a proper remedy" (371 U.S. at 130).

Disregarding the question whether, upon finding that the rate-break rule and the charges resulting therefrom were not shown to be unlawful and then dismissing the complaints, the Commission still had authority to choose a remedy,[23] the choice made here was clearly outside the issues raised and litigated. Indeed, during the course of hearings in the complaint proceedings a reopening and modification of the Docket 17000 Part VII orders was specifically ruled out by the Commission itself;[24] hence the Commission's broad vacation of the mandatory rate-break rule was not an "allowable" choice. (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 612, cited by the Commission at J.S. 12)

Gilbertville expressly holds that the issue involved in a choice of remedies must be one upon which "the parties have been heard" (371 U.S. at 130).

The Commission's contention is without merit.

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[23] Cf. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U.S. 88, 92.

[24] Footnote 7, *supra*.

III

The Commission (J.S. 13-14) and the other appellants (C&NW J.S. 8-14) both contend that by participating in the five complaint proceedings appellees received actual notice of the issues involved in a broad reopening of Docket 17000 Part VII. These contentions, like those just discussed, overlook the limited nature of the five complaints, which the Commission and the parties recognized, and the significant action of the Commission during the hearing stage in expressly ruling out such a broad reopening and modification of orders in Docket 17000 Part VII.

In this connection appellants contend that *Civil Aeronautics Board v. State Airlines*, 338 U.S. 572, stands for the proposition that "predecisional notice of the relief * * * contemplated" in an agency proceeding is not required and that relief may be granted "even beyond the application before it" (Commission J.S. 12; C&NW J.S. 11). There it appeared that the applicant had requested authority to transport on "the routes detailed [in the applications] *or such modification of such routes as the Board may find public convenience and necessity require*" (emphasis supplied) and that applicant also requested "such other and further relief * * * as the Board may deem appropriate, and to which applicant may be entitled in any proceeding in which the application may be heard in part or in its entirety." The routes awarded applicant "were all in the same general area covered by the consolidated hearings" (338 U.S. at 577).

In sharp contrast, the five complaints involved in the instant case were expressly limited to specific routes and contained at the conclusion of the prayer for relief merely the stereotyped request set out in No. 1 of the Commission's

"Approved Forms" (49 U.S.C.A. page 340): "that such other and further order or orders be made as the Commission may consider proper in the premises." The Commission in the instant case did not make an order covering "the same general area" as that involved in the five complaints. Rather it attempted to cover a much broader area, and additional traffic substantially greater in volume than, and moving under different conditions from, the traffic in issue. Moreover, in the instant case the Commission had ruled out in the course of the administrative hearings the very issues on which it later undertook action, a situation completely dissimilar from that involved in *State Airlines*. That case is clearly distinguishable on its facts.

Similar distinguishing features are readily apparent from an examination of the additional authorities cited by appellant railroads and Omaha Grain Exchange on this point (C&NW J.S. 8-13).[25]

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[25] *City of Dallas v. Civil Aeronautics Board*, 221 F. (2d) 501 (D.C. Cir. 1954) cert. denied, 348 U.S. 914, follows *State Airlines*, discussed above, and is distinguishable on similar grounds.

Civil Rule 15(b) and *Branding Iron Club v. Riggs*, 207 F. (2d) 720 (C.A. 10th 1953) cover a situation where issues not raised by the pleadings are tried by consent. A like situation is not present here.

New York Central & H.R. Co. v. Interstate Commerce Comm'n, 168 F. 131 (C.C.S.D. N.Y. 1909) and *Tagg Bros. v. United States*, 280 U.S. 420, both antedating the Administrative Procedure Act, involved orders of an administrative agency made after a determination that existing rates were unlawful, and the question, unlike that presented here, was whether the method chosen to remove the unlawfulness was within the issues.

United States v. Pierce Auto Lines, 327 U.S. 515, 523-5, involved the Commission's consideration of rival motor carrier applications on a common record. Applicants operated over different segments of the route applied for, and provided joint service through interchange. The Commission granted both applications, and this Court held that neither the fact that the Commission dealt with

IV

Finally, the Commission argues (J.S. 14) that "the court below imposed upon the Commission a stricter notice standard than applies in civil actions in the district court," citing Rule 54 (c) of the Federal Rules of Civil Procedure. That rule provides in part:

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered *is entitled*, even if the party has not demanded such relief in his pleadings." (Emphasis supplied.)

The rule does not provide that a judgment in a contested case shall grant relief to a party on an issue which is neither timely raised nor actually litigated and to which he is therefore not entitled. (cf. *United States v. 47 Bottles, More or Less, Etc.* (3rd Cir. 1963), 320 F. 2d 564, 573-4, cert. den. 375 U.S. 953). This contention, also, is without merit.

V

The vitality of appellee railroads as regulated industries and the economic life of the North Dakota appellees, who are shippers of grain or representatives of such shippers, de-

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both in one report nor that it granted both invalidated its order. The case is not pertinent.

In *Florida Citrus Comm. v. United States*, 144 F. Supp. 517 (N.D. Fla. 1956), affirmed per curiam 352 U.S. 1021, the Interstate Commerce Commission had before it a petition for increases in refrigeration charges. Hearings were held on the petition, a proposed report was issued, briefs filed, and oral argument allowed. The trial court found that "the party complaining had actual knowledge of and participated in the administrative proceedings," and therefore could not be heard to complain that he had no notice of the issues raised by the petition and embraced in the Commission's order allowing increases. The case is clearly distinguishable on its facts.

pend upon a lawful rate structure established and maintained under the standards of the Interstate Commerce Act and altered only pursuant to lawful procedures. (cf. *Pacific Inland Tariff Bureau v. United States*, 129 F. Supp. 472 (D.C. Ore. 1955), adhered to on reconsideration 134 F. Supp. 210.) Their specific interest in the maintenance of the absolute rate-break rule has already been pointed out (*supra*, pp. 6-7).

Though the June 5, 1964, order setting aside the absolute rate-break rule would have left appellees with the privilege of seeking suspension of individual grain rate proposals, that remedy would have been inadequate. Unless the appellees had challenged the Commission's action, violative of statutory procedure, in abrogating the mandatory rate-break rule in its broad application throughout the West, they would have been relegated to the task of contesting individual rate proposals in innumerable suspension proceedings. Many of such proceedings would not be terminated before the expiration of seven months, when the challenged rates would be permitted to go into effect (49 U.S.C. Section 15(7)). Even if appellees would then be successful, ultimately, in certain individual suspension cases—and this of course would be problematical under post-June 5, 1964 standards as set up by the Commission in its report—such success would not automatically reinstate the rule in areas or with respect to movements not in issue.

Regardless of the existence of alternative but ineffectual administrative remedies (*Greene v. United States*, 376 U.S. 149, 163), there is a well-recognized right to have the order of an administrative agency set aside in cases where procedural safeguards have been disregarded and the order is therefore void. *Morgan v. United States*, 304 U.S. 1, 15.

The June 5, 1964, order constituted rulemaking. Section 2(c) of the Administrative Procedure Act[26] provides in part as follows:

> "'Rule' * * * includes the approval or prescription for the future of rates, * * * prices, * * * or practices bearing upon any of the foregoing. *'Rule making' means agency process for the formulation, amendment, or repeal of a rule.*" (Emphasis supplied.)

The district court's memorandum opinion demonstrates that neither Section 4 of the Administrative Procedure Act[27] providing procedures for rulemaking nor Section 16(6)[28] of the Interstate Commerce Act was followed in this case.[29]

Since appellees and other shippers and carriers had no notice that the Commission was to consider the broad issues on which the order of reopening and modification was in fact predicated, they had no occasion to present data and argument on the very issues which were discussed by the Commission in the final three pages of its report, which deal with the broader questions. Specifically, the appellee railroads, in meeting the issues under the five complaint cases, which did not involve rate levels or intermodal competition, had no occasion to present evidence that not only was it possible under the rate-break system to meet the competi-

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[26] 5 U.S.C. Section 1001(c)

[27] 5 U.S.C. Section 1003

[28] 49 U.S.C. Section 16(6)

[29] At page 775 of the report two Commission precedents are referred to in purported justification of the procedure followed as being in compliance with Section 16(6). Neither *Grain and Grain Products*, 298 I.C.C. 261, nor *Increased Freight Rates, 1958*, 302 I.C.C. 665, however, is in point, for in each instance both notice and an opportunity to be heard on the issues actually determined were accorded (298 I.C.C. at 262; 302 I.C.C. at 673).

tion of unregulated transportation, but also the extent and manner in which such competition was actually being met within the Western district.[30] Likewise, there was no occasion to deal with the notion that the existing rate structure throughout the entire West was "static" in relation to the trend to "bare bones" pricing and in comparison with reductions made in other areas. (See 322 I.C.C. at 773-774.) But on proper notice it would have been the carriers' right to go into these subjects and show the vitality of the rates presently maintained under the rate-break system and the degree of flexibility which that structure now permits on movements throughout the West.

In such a comprehensive case the North Dakota appellees and other members of the shipping public would have had a chance to submit facts and views as to the effect of such a broad order upon the pricing and marketing of grain and its products throughout the West, not just the effect of an order granting relief in the five complaint cases.

Morgan v. United States, 304 U.S. 1, 18-19, and *Hill v. Federal Power Comm'n,* 335 F. (2d) 355, 363 (5th Cir. 1964), though involving the right to a statutory hearing rather than the right to submit data and argument under Section 4 of the Administrative Procedure Act, graphically illustrate the imperative necessity for notice of the issues to be determined by administrative agencies and an adequate opportunity to meet them.

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[30] See footnote 8, *supra,* quoting *Southeastern Association of Railroad and Utilities Comm'rs v. A. T. & S. F. Ry. Co.* (1964), 321 I.C.C. 519, 545-546.

CONCLUSION

In *Grain and Grain Products,* 298 I.C.C. 261, the Commission afforded both notice and an opportunity to present data, views and argument before determining whether to modify the outstanding rate-break orders affecting coarse grains and to what extent. It reached its conclusion in about a year—a shorter period than the instant case has been pending in the federal courts.

To insist, therefore, that the minimum requirements of the Administrative Procedure Act be complied with in the present situation surely raises no serious difficulties. Clearly the judgment of the district court must be affirmed.

Respectfully submitted,

ELDON MARTIN
ROBERT J. COONEY
FRANK S. FARRELL
ROBERT G. GEHRZ
WILLIAM P. HIGGINS
CURTIS H. BERG
JOHN H. BISHOP
LOUIS E. TORINUS, JR.
1120 Great Northern Building
St. Paul, Minnesota 55101
PAUL M. SAND
First Assistant Attorney General, State of North Dakota
The Capitol
Bismarck, North Dakota
Counsel for Appellees

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